

1 James M. Wagstaffe (95535)  
2 **KERR & WAGSTAFFE LLP**  
3 100 Spear Street, Suite 1800  
4 San Francisco, CA 94105-1528  
5 Telephone: (415) 371-8500  
6 Fax: (415) 371-0500

7 James E. Magleby (Utah Bar No. 7247, admitted *pro hac vice*)  
8 Jason A. McNeill (Utah Bar No. 9711, admitted *pro hac vice*)  
9 **MAGLEBY & GREENWOOD, P.C.**  
10 170 South Main Street, Suite 350  
11 Salt Lake City, Utah 84101-3605  
12 Telephone: (801) 359-9000  
13 Facsimile: (801) 359-9011  
14 Attorneys for Defendant and  
15 Counterclaim Plaintiff Podfitness, Inc.

16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18 OAKLAND DIVISION

19 APPLE COMPUTER, INC.,

20 Plaintiff,

21 v.

22 PODFITNESS, INC., and DOES 1-100,  
23 Inclusive,

24 Defendants.

25 PODFITNESS, INC.,

26 Counterclaim Plaintiff,

27 v.

28 APPLE COMPUTER, INC.,

Counterclaim Defendants.

Case No. C 06-05805 SBA

**DECLARATION OF GREG  
WAYMENT IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Hon. Sandra Brown Armstrong

1 I, Greg Wayment, hereby declare:

2 1. I am a paralegal with the law firm of Magleby & Greenwood, P.C., attorneys for  
3 Defendant Podfitness, Inc. ("Defendant"). I have personal knowledge of the facts set forth  
4 herein and, if called as a witness, would testify competently thereto.

5 2. Attached to this declaration are true and correct copies of printouts of a number of  
6 WebPages which I downloaded and saved electronically in .pdf format. Also attached are certain  
7 documents which are from the document productions in the custody of Magleby & Greenwood,  
8 P.C., and which I understand to be the productions of Apple, Inc. These documents have Control  
9 Nos. that begin with APD. Also attached are documents and correspondence from the files of  
10 Magleby & Greenwood, P.C.

11 3. Attached as Exhibit "1" are true and correct excerpts from www.apple.com,  
12 which has the Official iPod Store at www.apple.com/store. I captured this attachment from the  
13 url http://store.apple.com/1-800-MY-APPLE/Webobjects/AppleStore, on February 13, 2008, and  
14 the attached accurately reflects what was displayed on my computer screen, although there may  
15 be minor differences based upon the conversion of the document from electronic to .pdf format.

16 4. Attached as Exhibit "2" are true and correct copies of the results of a search  
17 through the search engine Google for the term "iPod," which includes a number of links to the  
18 www.apple.com site. I captured this attachment from the url http://www.google.com/search?  
19 hl=en&q=ipod, on February 4, 2008, and the attached accurately reflects what was displayed on  
20 my computer screen, although there may be minor differences based upon the conversion of the  
21 document from electronic to .pdf format.

22 5. Attached as Exhibit "3" are true and correct copies of documents produced by  
23 Apple with Control Nos. APD000066 – APD000075 (the "Office Action").

24 6. Attached as Exhibit "4" are true and correct copies of documents produced by  
25 Apple with Control Nos. APD000045 – APD000062 (the "Response to Office Action").

26 7. Attached as Exhibit "5" are true and correct copies of documents produced by  
27 Apple with Control Nos. APD000099 – APD000120 (the "December 18, 2002 Facsimile").  
28

1           8.       Attached as Exhibit "6" is a true and correct copy of the Complaint for Trademark  
2 Infringement, *et al.*, downloaded from Pacer, in the case of Cisco v. Apple, Case No. C 07-0198.

3           9.       Attached as Exhibit "7" is a true and correct copy of a web article dated January  
4 10, 2007, from CNET News.com. I captured this attachment from the url [http://www.news.com/](http://www.news.com/2100-1047_3-6149285.html)  
5 [2100-1047\\_3-6149285.html](http://www.news.com/2100-1047_3-6149285.html), on January 25, 2008, and the attached accurately reflects what was  
6 displayed on my computer screen, although there may be minor differences based upon the  
7 conversion of the document from electronic to .pdf format.

8           10.      Attached as Exhibit "8" is a true and correct copy of results of searching for the  
9 word "pod" in the Trademark Electronic Search System ("TESS") on the United States Patent  
10 and Trademark Office website, reflecting that 1,233 records were found. I captured this  
11 attachment from the url [http://tess2.uspto.gov/bin/showfield?=&state=gjh6rp.1.1&p\\_search](http://tess2.uspto.gov/bin/showfield?=&state=gjh6rp.1.1&p_search=&searchss&p_L=50)  
12 [=&searchss&p\\_L=50](http://tess2.uspto.gov/bin/showfield?=&state=gjh6rp.1.1&p_search=&searchss&p_L=50), on February 9, 2008, and the attached accurately reflects what was  
13 displayed on my computer screen, although there may be minor differences based upon the  
14 conversion of the document from electronic to .pdf format.

15           11.      Attached as Exhibit "9" is a true and correct copy of the first few pages of the  
16 results of a Google search for the word "pod," which reflects 410,000,000 results. I captured this  
17 attachment from the url <http://www.google.com/search?hl=en&safe=off&q=pod&btnG=Search>,  
18 on December 14, 2007, and the attached accurately reflects what was displayed on my computer  
19 screen, although there may be minor differences based upon the conversion of the document  
20 from electronic to .pdf format.

21           12.      Attached as Exhibit "10" is a true and correct copy of the page for the site  
22 "[mp3.com](http://www.mp3.com)," which was found by clicking on a link from the "pod" search on Google in Ex. 9. I  
23 captured this attachment from the url <http://www.mp3.com/artist/pod/summary/>, on February 21,  
24 2008, and the attached accurately reflects what was displayed on my computer screen, although  
25 there may be minor differences based upon the conversion of the document from electronic to  
26 .pdf format.

27           13.      Attached as Exhibit "11" are true and correct copies of the first few pages of the  
28 results of a Google search for the word "podcast," which reports 109,000,000 "hits" for the term.

1 I captured this attachment from the url <http://www.google.com/search?hl=en&q=podcast&aq=f>,  
2 on February 13, 2008, and the attached accurately reflects what was displayed on my computer  
3 screen, although there may be minor differences based upon the conversion of the document  
4 from electronic to .pdf format.

5 14. Attached as Exhibit "12" is a true and correct copy of the site  
6 <http://www.engadget.com/2006/09/24/with-pod-on-lockdown-apple-goes-after-podcast/>,  
7 which reports that "Apple's lawyers have scared the pants off of small entrepreneurs selling  
8 products like the Profit Pod and TightPod – items having nothing to do with audio portable in  
9 any way mind you –it seems that the next targets are companies that have the audacity to use the  
10 word 'podcast' in their names." I captured this site on February 12, 2008, and the attached  
11 accurately reflects what was displayed on my computer screen, although there may be minor  
12 differences based upon the conversion of the document from electronic to .pdf format.

13 15. Attached as Exhibit "13" are true and correct copies of pages from various  
14 websites offering "i" products, including the following: the site iLounge (offering "All things  
15 iPod, iPhone, iTunes and beyond"), I captured this attachment from the url  
16 <http://www.ilounge.com>, on February 4, 2008, and the attached accurately reflects what was  
17 displayed on my computer screen, although there may be minor differences based upon the  
18 conversion of the document from electronic to .pdf format.; iThings and ithings.co.uk., I  
19 captured this attachment from the url <http://www.ithings.co.uk>, on February 13, 2008, and the  
20 attached accurately reflects what was displayed on my computer screen, although there may be  
21 minor differences based upon the conversion of the document from electronic to .pdf format.;  
22 iTrainer and [itrainer.com](http://www.itrainer.com) (identified as "The Personal Trainer on your iPod – Get Fit and Lose  
23 Weight – MP3 Fitness Programs"), I captured this attachment from the url [http://www.itrainer](http://www.itrainer.com/au/public/index.aspx)  
24 [.com/au/public/index.aspx](http://www.itrainer.com/au/public/index.aspx), on February 13, 2008, and the attached accurately reflects what was  
25 displayed on my computer screen, although there may be minor differences based upon the  
26 conversion of the document from electronic to .pdf format; iTrain and [itrain.com](http://www.itrain.com) (offering  
27 "iTread," iCycle," "iClimb," iRow," iStrength," and numerous other "i" formative programs), . I  
28 captured this attachment from the url <http://www.itrain.com/index1.php>, on February 13, 2008,

1 and the attached accurately reflects what was displayed on my computer screen, although there  
2 may be minor differences based upon the conversion of the document from electronic to .pdf  
3 format.; iFitnessDirect and [ifitnessdirect.com](http://www.ifitnessdirect.com), iFitness Solutions Club and ifitness.net, I captured  
4 this attachment from the url <http://www.ifitnessdirect.com>, on February 13, 2008, and the  
5 attached accurately reflects what was displayed on my computer screen, although there may be  
6 minor differences based upon the conversion of the document from electronic to .pdf format;  
7 iAmplify; iHome (offering an “iH” formative line of products, such as the iHM1B2 “Portable  
8 Speaker for iPod Nano” and the iHM3B “Portable Speaker for MP3 Players”), I captured this  
9 attachment from the url [http://www.ihomeaudio.com/prodShelf.asp?dept\\_id=1007](http://www.ihomeaudio.com/prodShelf.asp?dept_id=1007), on February  
10 13, 2008, and the attached accurately reflects what was displayed on my computer screen,  
11 although there may be minor differences based upon the conversion of the document from  
12 electronic to .pdf format; iSkin and [iskin.com](http://www.iskin.com) (“iskin touch for iPod classic”) . I captured this  
13 attachment from the url <http://www.iskin.com/>, on February 13, 2008, and the attached  
14 accurately reflects what was displayed on my computer screen, although there may be minor  
15 differences based upon the conversion of the document from electronic to .pdf format; iZap  
16 (lithium battery line for the iPod) . I captured this attachment from the url [http://www.mobile](http://www.mobilewhack.com/reviews/izap_lithium_battery_line_for_the_ipod.html)  
17 [whack .com/ reviews/izap lithium battery line for the ipod.html](http://www.mobilewhack.com/reviews/izap_lithium_battery_line_for_the_ipod.html), on February 13, 2008, and  
18 the attached accurately reflects what was displayed on my computer screen, although there may  
19 be minor differences based upon the conversion of the document from electronic to .pdf format;  
20 iToner (program to manage iPhone ringtones), I captured this attachment from the url  
21 <http://www.ambrosiasa.com/utilities/itoner/>, on February 13, 2008, and the attached accurately  
22 reflects what was displayed on my computer screen, although there may be minor differences  
23 based upon the conversion of the document from electronic to .pdf format.

24 16. Attached as Exhibit “14” are true and correct copies of pages from various  
25 websites offering iPod products or using the “iPod” name, including the following:  
26 [ipodcarparts.com](http://www.ipodcarparts.com), I captured this attachment from the url <http://www.ipodcarparts.com>, on  
27 February 8, 2008, and the attached accurately reflects what was displayed on my computer  
28 screen, although there may be minor differences based upon the conversion of the document

1 from electronic to .pdf format; [theipodaccessorystore.com](http://www.theipodaccessorystore.com), I captured this attachment from the  
2 url <http://www.theipodaccessorystore.com>, on February 12, 2008, and the attached accurately  
3 reflects what was displayed on my computer screen, although there may be minor differences  
4 based upon the conversion of the document from electronic to .pdf format; [hipodgear.com](http://www.hipodgear.com), I  
5 captured this attachment from the url <http://www.hipodgear.com>, on February 8, 2008, and the  
6 attached accurately reflects what was displayed on my computer screen, although there may be  
7 minor differences based upon the conversion of the document from electronic to .pdf format;  
8 iPodCopy software; iPod Hacks and [ipodhacks.com](http://www.ipodhacks.com), I captured this attachment from the url  
9 <http://www.ipodhacks.com>, on February 8, 2008, and the attached accurately reflects what was  
10 displayed on my computer screen, although there may be minor differences based upon the  
11 conversion of the document from electronic to .pdf format; [iPodFanatic.com](http://www.ipodfanatic.com), I captured this  
12 attachment from the url <http://www.ipodfanatic.com>, on February 8, 2008, and the attached  
13 accurately reflects what was displayed on my computer screen, although there may be minor  
14 differences based upon the conversion of the document from electronic to .pdf format;  
15 allthingsiPod and [allthingsipod.co.uk](http://www.allthingsipod.co.uk); "iFidelity DVD Notebook for iPod," "iFidelity Clock  
16 Radio for iPod" (an "accessory set for iPod"); [iProng.com](http://www.iprong.com) and iProng Magazine ("the  
17 publication for iPod and iPhone users"), I captured this attachment from the url  
18 <http://www.iprong.com>, on February 9, 2008, and the attached accurately reflects what was  
19 displayed on my computer screen, although there may be minor differences based upon the  
20 conversion of the document from electronic to .pdf format; [everythingiPod.com](http://www.everythingipod.com) ("The  
21 Superstore for your iPod"), I captured this attachment from the url <http://www.dlo.com/index.tpl>  
22 on February 13, 2008, and the attached accurately reflects what was displayed on my computer  
23 screen, although there may be minor differences based upon the conversion of the document  
24 from electronic to .pdf format; iPodLinux, I captured this attachment from the url  
25 [http://ipodlinux.org/main\\_page](http://ipodlinux.org/main_page), on February 13, 2008, and the attached accurately reflects what  
26 was displayed on my computer screen, although there may be minor differences based upon the  
27 conversion of the document from electronic to .pdf format; iFrogz (iWrapz for iPod and iPhone),  
28 I captured this attachment from the url <http://ifrogz.com>, on February 9, 2008, and the attached

1 accurately reflects what was displayed on my computer screen, although there may be minor  
2 differences based upon the conversion of the document from electronic to .pdf format;  
3 ipodgear.com (iPod stuff'n'more), I captured this attachment from the url http://www.  
4 ipodgear.com, on February 9, 2008, and the attached accurately reflects what was displayed on  
5 my computer screen, although there may be minor differences based upon the conversion of the  
6 document from electronic to .pdf format.

7 17. Attached as Exhibit "15" are true and correct copies of pages found at  
8 ipodtour.com and ipodtraining.com, I captured this attachment from the url http://www.ipodtour  
9 .com, on February 9, 2008, and from the url http://www.ipodtraining.com/ on February 9, 2008,  
10 and the attached accurately reflects what was displayed on my computer screen, although there  
11 may be minor differences based upon the conversion of the document from electronic to .pdf  
12 format.

13 18. Attached as Exhibit "16" are true and correct copies of pages of images of white  
14 earbuds that resulted from a search in Google for the terms "earbuds white," and then following  
15 the "Product search results for earbuds white" link. Only the first 5 pages from the search are  
16 attached. I captured this attachment from the url http://www.google.com/products?hl=en&q=  
17 earbuds+white&um=1&ie=UTF-8, on February 9, 2008, and the attached accurately reflects what  
18 was displayed on my computer screen, although there may be minor differences based upon the  
19 conversion of the document from electronic to .pdf format


20 19. Attached as Exhibit "17" is a true and correct copy of Apple's Objections and  
21 Responses to Podfitness' First Set of Interrogatories.

22 20. Attached as Exhibit "18" is a true and correct copy of correspondence from James  
23 E. Magleby to counsel for Apple, dated January 17, 2007.

24  
25  
26  
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21. Attached as Exhibit "19" is a true and correct copy of correspondence from  
Andrew Abrams to James E. Magleby, dated January 30, 2007.

I declare under penalty of perjury under the laws of the United States of America that the  
foregoing is true and correct. Executed on the 14<sup>th</sup> day of February at Salt Lake City, Utah.

  
GREG WAYMENT